Departing from confidentiality in international dispute resolution

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Abstract *This article considers the degree of confidentiality that applies to three forms of international dispute resolution: inter-State, investor-State and international commercial arbitration. The degree of confidentiality associated with investment arbitration led to calls for reform, which have led to new mechanisms and proposals to increase transparency. Problems are, however, still generated by the degree of confidentiality that persists. International commercial arbitration retains a higher degree of confidentiality, but it is now increasingly a forum for the resolution of disputes in which the parties are not the only ones to have a legitimate interest. Furthermore, prominent judges have expressed the view that so many commercial disputes are now submitted to confidential arbitration that the development of the common law is suffering. When parties to a commercial arbitration have agreed that it should be confidential, then subject to applicable law, that should and will be the position. When, however, they have not so agreed, there are good reasons to consider that an award rendered in an international commercial arbitration should not by default be confidential.*

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I. INTRODUCTION

Jeremy Bentham famously said that 'Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'[1]

In this context, I propose to consider three things:

(a) the extent to which justice is public in the three forms of international dispute resolution under consideration in this paper;

(b) some difficulties with the status quo; and

(c) the desirability of further change in relation to international commercial arbitration.

II. HOW CONFIDENTIAL IS INTERNATIONAL DISPUTE RESOLUTION NOW?

A. Inter-State disputes

Other than on issues concerning recusal of judges, the International Court of Justice now represents the high watermark of publicity in international dispute resolution. After consultation with the parties:

(a) written pleadings and evidence annexed to them are routinely made available online from the commencement of the hearing;[2]

(b) hearings are open to the public,[3] including on the internet;[4] and

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[1] As quoted in Rt Hon Beverley McLachlin PC, 'Openness and the Rule of Law' (Annual International Rule of Law Lecture, London, 8 January 2014) and *see* 'Publicity in the Courts of Justice' in John H Burton (ed), Benthamiana: Select Extracts from the Works of Jeremy Bentham (1843), p 115.

[2] International Court of Justice, Rules of Court 1978, art 53(2). The rule provides: 'The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings.' In the last ten years, written pleadings and the accompanying evidence have been made available in all contentious cases in which oral proceedings on preliminary objections or on the merits have taken place, and since 2015 this has included the accompanying evidence being made available on the Court's website.

[3] Statute of the International Court of Justice 1945, art 46; International Court of Justice, Rules of Court 1978, art 59.

[4] Since 2004: *see* International Court of Justice, Press Release, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (19 February 2004) <https://www.icj-cij.org/files/case-related/131/131-20040219-PRE-01-00-EN.pdf> accessed 14 June 2020, referring to the 'exceptional interest in this case shown by the general public, civil society and the media worldwide'. The practice is now established for all cases.

(c) judgments are of course public.[5]

Inter-State arbitration is historically its secretive elder cousin, but the Permanent Court of Arbitration (hereinafter 'PCA') has now brought it out into the light to a large degree. It has done so with a considerable degree of flexibility, including the ability to make certain parts of the evidence and written and oral submissions confidential, while keeping the remainder of the arbitration transparent.[6]

One might fairly say that most inter-State cases are mostly transparent most of the time.[7]

B. Investment arbitration

In cases under the investment chapters of the North American Free Trade Agreement (hereinafter 'NAFTA') and the Dominican Republic Central America United States Free Trade Agreement (hereinafter 'DR-CAFTA'), just about everything is public.[8] In most other investment arbitrations, the award becomes public through one means or another, but the evidence and written submissions are regarded as confidential, and hearings are held in private. The trend is for more transparency, largely in response to strong and justified calls for greater information as to how and by whom cases evaluating the regulatory choices of States are being decided, and with what consequences for the public purse.

Responding to those calls, the United Nations Commission on International Trade Law (hereinafter 'UNCITRAL') Rules on Transparency have from 2014 provided a basis for most aspects of an investment arbitration

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[5] International Court of Justice, Rules of Court 1978, art 94(2): 'The judgment shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading.'

[6] *See Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine* v *Russia*) (PCA Case No 2017-06) Rules of Procedure, 18 May 2017, art 27 (Transparency); *The 'Enrica Lexie' Incident* (*Italy* v *India*) (PCA Case No 2015-28) Rules of Procedure, 19 January 2016, art 23 (Transparency); *The ARA Libertad Arbitration* (*Argentina* v *Ghana*) (PCA Case No 2013-11) Rules of Procedure, 31 July 2013, art 12 (Publicity of Proceedings).

[7] Apologies to Louis Henkin, who famously said that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.' Louis Henkin, How Nations Behave (2nd edn, 1979), p 47.

[8] *See* DR-CAFTA, art 10.21; NAFTA, art 1137.4 and Annex 1137.4; NAFTA Free Trade Commission, 'North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001). *See* also NAFTA Free Trade Commission, 'Statement of the Free Trade Commission on non-disputing party participation' (7 October 2003).

to be public,[9] but there is only a limited number of cases in which they are already in operation.[10] However, since their release, at least sixty-one treaties have been signed providing for the application of the UNCITRAL Rules on Transparency or provisions modelled on them. Of these, twenty-eight have already entered into force.[11] In Australia, the International Arbitration Act, 1974 was amended in 2018 to provide that the sections of that Act providing for confidentiality shall not apply to arbitral proceedings to which the UNCITRAL Rules on Transparency apply.[12]

The Mauritius Convention involves an election by States to apply the UNCITRAL Rules on Transparency to arbitrations under investment treaties dating from prior to the adoption of those rules. It entered into force in October 2017 for the first three States to ratify it (Canada, Mauritius, and Switzerland). Since then, Cameroon and Gambia have joined them as parties.

The UNCITRAL Rules on Transparency are also referred to in the new Rules for International Investment Arbitration adopted by the Beijing Arbitration Commission (hereinafter 'the Beijing Rules'). The Beijing Rules entered into effect as recently as 1 October 2019. They provide that where

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[9] Art 2 requires publication of basic information about filed cases. Art 3(1) requires disclosure of key documents, including the tribunal's decisions and awards and the parties' statements of claim and defence. Art 5 allows for participation of non-disputing third parties in certain circumstances. Art 6(1) requires public hearings.

[10] *See*, for eg, *Doutremepuich* v *Republic of Mauritius* (PCA Case No 2018-37) Procedural Order No 4 on Hearing Organisation, 5 June 2019, and Terms of Appointment, 9 August 2018; *Carrizosa Gelzis* v *Republic of Colombia* (PCA Case No 2018-56) Procedural Order No 1, 29 January 2019 (as amended on 22 March 2019); *BSG Resources* v *Republic of Guinea* (ICSID Case No ARB/14/22) Procedural Order No 2 on Transparency, 17 September 2015. *See* also *Iberdrola* v *Plurinational State of Bolivia* (PCA Case No 2015-05) Terms of Appointment, 7 August 2015, art 14.1. In *Cairn Energy* v *Republic of India* (PCA Case No 2016-7) Procedural Order No 2, 12 August 2016, paras 27-59 the tribunal found that there was no legal basis to apply the UNCITRAL Rules on Transparency, but used its powers under the general provision of the UNCITRAL Arbitration Rules 1976, art 15, to fashion a bespoke transparency regime granting a high degree of 'post-award transparency' and a restricted degree of 'pre-award transparency', on the basis of rationales also applicable to the practice of the ICJ, discussed above. The equivalent provision of the UNCITRAL Arbitration Rules 2010, art 17, provides that: 'Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'

[11] UNCITRAL, 'Status of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration' <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status> accessed 14 June 2020.

[12] International Arbitration Act, 1974 (as amended by the Civil Law and Justice Legislation Amendment Act, 2018), s 22(3). *See* n 57 and n 58 below for the amendments in 2010 and 2015 to the International Arbitration Act, 1974 that introduced provisions on confidentiality.

the parties have agreed in writing, certain articles of the UNCITRAL Rules on Transparency shall apply and shall prevail over the Beijing Rules. The Beijing Rules go on to state that:

> Where the Parties have no agreement on the application of the UNCITRAL Transparency Rules, the Notice of Arbitration, Notice of Appeal (if applicable), orders, decisions and the award of the Arbitral Tribunal and the Appellate Tribunal (if applicable) shall be made public, except for confidential or otherwise protected information therein. The timing and manner of such publication shall be decided by the BAC, taking into account the circumstances of the case.[13]

Under the convention establishing the International Centre for Settlement of Investment Disputes (hereinafter 'ICSID'), 'The Centre shall not publish the award without the consent of the parties'.[14] This is reflected in the ICSID Arbitration Rules, although they add that even absent consent, excerpts of the legal reasoning may be published.[15] Recently, ICSID embarked on its fourth review of the ICSID Arbitration Rules. To date, that review has involved four sequential working papers, each taking into account comments received from States and the public, with the most recent working paper published on 28 February 2020. It proposes a new rule that consent to the publication of awards and decisions on annulment 'shall be deemed to have been given if no party objects in writing to such publication within 60 days after the dispatch of the document'.[16] This is a neat way, in cases of silence, to create the consent for publication required by the ICSID Convention. However, the terms of the ICSID Convention mean that even under this proposal, publication by the Centre is still subject to the unilateral veto of either party, so long as it acts within sixty days. Publication of the award other than by the Centre has become a different matter.

Although the ICSID Convention deals with publication of awards by the Centre, it does not address orders or decisions of the tribunal other than awards, nor documents submitted to the tribunal. Publication of these documents being unfettered by the ICSID Convention, all four of the working papers have proposed that orders and decisions of the tribunal other than the award be published, with any redactions to be agreed by the parties or

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[13] Beijing Rules, art 50(2).

[14] ICSID Convention, art 48(5).

[15] ICSID Arbitration Rules, r 48(4).

[16] ICSID, 'Proposals for Amendment of the ICSID Rules' (2020) Working Paper #4 vol 1, Arbitration Rules, r 62(3), pp 64-65, 331-332. This provision had been included in Working Paper #1, published in August 2018, omitted from Working Paper #2, published in March 2019, only to be reintroduced in Working Paper #3, published in August 2019, and maintained in Working Paper #4, published in February 2020.

ordered by the tribunal.[17] For these documents, no party would have any unilateral right to veto publication or to control any redactions.

For documents submitted to the tribunal, rather than issued by it, notably the written submissions and the evidence, the most recent working paper proposes a compromise position that retreats from the broader transparency that would have followed from the position adopted in the previous working papers. The most recent proposal is that the Centre publish such documents with the consent of all parties to the arbitration. Absent such mutual consent, a party may only request publication of a submission filed by that party, subject to redactions to be determined by the tribunal, which must in turn ensure that publication does not disclose any confidential or protected information.[18] Evidence could not be made public without mutual consent and no party could require or even have a basis for requesting the tribunal to order publication of any submissions other than its own. Of course, subject to redactions ruled upon by the tribunal, one party's description in its own submissions of the other party's position could become public. That may well convince a party initially resistant to publication of its own submissions ultimately to decide that publication is in its interests. Notwithstanding that possibility, the new compromise proposal is regressive compared to the approach that had been proposed in the previous working papers, whereby either party could request the publication of any document filed in the proceeding, whether submissions or evidence, with disagreements about publication and redactions to be determined by the tribunal.[19]

ICSID's latest working paper is equally regressive concerning attendance at hearings, including by way of broadcast by the Centre on the internet, other than by those involved in the arbitration. While the previous paper left this to the determination of the tribunal, 'after consulting with the parties', the most recent one reverted to the approach that had been put forward in the first two working papers, granting any party a veto on the hearing being public.[20]

The future might be brighter, but we are in large measure still living in the past. Most cases are not under NAFTA, DR-CAFTA, the UNCITRAL Rules on Transparency, or the Beijing Rules, and the proposed new ICSID Rules remain just proposals, which have themselves suffered from some regression over the course of the four working papers thus far produced.

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[17] For the most recent formulation, *see ibid*, r 63, pp 65, 332.
[18] *Ibid*, r 64, pp 66, 333-334.
[19] *Ibid*, r 64, pp 333-334, showing the new proposal compared to the earlier proposal it replaces, with explanatory commentary.
[20] *Ibid*, r 65, pp 66, 334.

C. International commercial arbitration

It might be fair to say that most commercial arbitrations in most places are mostly private most of the time,[21] but the direction of travel is away from comprehensive privacy and confidentiality.

Many commercial arbitrations are conducted under the rules of one arbitral institution or another, and most are subject to the national law of one seat or another. These do not contain any uniform approach to confidentiality. Even where confidentiality is, as the London Court of International Arbitration (hereinafter 'LCIA') Rules put it, the 'general principle', various exceptions exist, including for disclosures required by law or for the purpose of challenging an award.[22]

III. Difficulties Created by the Current Degree of Confidentiality

I turn to some examples from investment arbitration which show that continued movement towards transparency is desirable.

The first is that in February 2017, two identically constituted investment tribunals[23] hearing parallel claims against the Russian Federation concern-

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[21] Renewed apologies to Louis Henkin (n 7).

[22] Concerning institutional arbitration rules, *see*:

International Chamber of Commerce (hereinafter 'ICC') Arbitration Rules 2017, art 22(3): 'Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration.'

LCIA Arbitration Rules 2014, art 30.1: 'The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.'

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter 'SCC') 2017, art 3: 'Unless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.'

Arbitration Rules of the Singapore International Arbitration Centre 2016, r 39.1: 'Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential.' But note the exceptions in Rule 39.2.

[23] *PJSC CB PrivatBank and Finance Company Finilon LLC* v *The Russian Federation* (PCA Case No 2015-21); *Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky* v *The*

ing investments made in Crimea issued interim awards finding that they had jurisdiction. The text of the decisions is not public, although we know, because of press releases issued by the PCA and the claimants' counsel, that in each case the tribunal found that it had jurisdiction under the Russia-Ukraine bilateral investment treaty, on the basis that Russia was in control of Crimea at the relevant time.[24] There are now at least eight additional arbitrations that raise the same issue.[25] Two of them, heard in coordination by the same tribunal, which was seated in Geneva, also found in favour of the claimants in interim awards on jurisdiction.[26] Those awards were challenged by the Russian Federation before the Swiss Federal Tribunal, resulting in two brief judgments in German rejecting the applications to set aside the awards.[27] Of course, the court judgments are publicly available, but the arbitral awards to which they relate are not.

Russian Federation (PCA Case No 2015-07). In each case the members of the tribunal are Professor Pierre Marie-Dupuy, Presiding Arbitrator, Sir Daniel Bethlehem, KCMG, QC, appointed by the Claimants, and Dr Václav Mikulka, appointed on behalf of the Russian Federation by the appointing authority (Mr Michael Hwang) in the *PJSC PrivatBank* arbitration, and by the former appointing authority (Judge Bruno Simma) in the *Aeroport Belbek* arbitration.

[24] PCA, Press Release, 'Arbitration Between PJSC PrivatBank and Finance Company Finilon LLC as Claimants and the Russian Federation' (9 March 2017) <https://pcacases.com/web/sendAttach/2093> accessed 14 June 2020; PCA, Press Release, 'Arbitration Between Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky as Claimants and the Russian Federation' (9 March 2017) <https://pcacases.com/web/sendAttach/2090> accessed 14 June 2020; Hughes Hubbard & Reed, 'Hughes Hubbard Wins Jurisdiction Decisions in Crimea Arbitration' (Hughes Hubbard & Reed, 1 March 2017) <https://www.hugheshubbard.com/news/breaking-news-hughes-hubbard-secures-first-award-holding-russia-responsible-in-crimea> accessed 14 June 2020; Alison Ross, 'Crimea cases against Russia to proceed' (Global Arbitration Review, 9 March 2017) <http://globalarbitrationreview.com/article/1137587/crimeacases-against-russia-to-proceed> accessed 14 June 2020; Luke E Peterson, 'In Jurisdiction Ruling, Arbitrators Rule that Russia is Obliged Under BIT to Protect Ukrainian Investors in Crimea Following Annexation' (Investment Arbitration Reporter, 9 March 2017) <https://www.iareporter.com/articles/in-jurisdiction-ruling-arbitrators-rule-that-russia-is-obliged-under-bit-to-protect-ukrainian-investors-in-crimea-following-annexation/> accessed 14 June 2020; Caroline Simson, 'Ukrainian Investors' Claims Against Russia Pass First Hurdle' (Law 360, 9 March 2017) <https://www.law360.com/internationalarbitration/articles/900136> accessed 14 June 2020.

[25] Serhii Uvarov, 'Investment disputes related to Crimea: overview' (Arbitration Journal, 22 January 2019) <https://journal.arbitration.ru/reviews/investment-disputes-related-to-crimea-overview/> accessed 14 June 2020.

[26] *PJSC Ukrnafta* v *The Russian Federation* (PCA Case No 2015-34); *Stabil LLC and Others* v *The Russian Federation* (PCA Case No 2015-35). In each case the members of the tribunal were Professor Gabrielle Kaufmann-Kohler, Presiding Arbitrator, Mr Daniel M Price, appointed by the Claimants, and Professor Brigitte Stern, appointed on behalf of the Russian Federation by the appointing authority (Mr Michael Hwang).

[27] Decision of the Federal Tribunal (Switzerland) 4A_396/2017 of 16 October 2018; Decision of the Federal Tribunal (Switzerland) 4A_398/2017 of 16 October 2018. For a summary in English, *see* Lisa Bohmer, 'In Now-Public Decisions, Swiss Federal Tribunal Clarifies Reasons for Dismissing Challenges to Two Crimea-Related Investment Treaty Awards Against Russia' (Investment Arbitration Reporter, 16 November 2018) <https://www.iareporter.com/articles/in-now-public-decisions-swiss-federal-tribunal-clarifies-rea-

The application of an investment treaty on the basis of control over territory rather than sovereignty over territory is an important point. Having tribunals decide it in so many cases, all against the same respondent State concerning the same territory, without access to the awards that have already considered it, is hardly desirable. Since the respondent State is now appearing in these arbitrations, it has the benefit of access to all of the relevant awards to which it, of course, was a party, whereas the claimants and tribunals do not have the benefit of such access. In addition to concerns of fairness arising from this differential access to previous relevant awards, it may also lead to decisions of lower quality, or at least decisions that could have been reached more efficiently if the tribunal and the claimant did not have to reinvent the wheel. Furthermore, it increases the prospect of inconsistent decisions on the same questions. Arbitral tribunals will reach inconsistent decisions if they each come to their own considered view, and those considered views are inconsistent. This should, however, not be an ordinary occurrence, and the relevant considerations for any sensible arbitral tribunal should include the reasoning and findings of other tribunals that have already addressed the same question. When that is not known, and tribunals making decisions about the same question are doing so in the dark from each other, the risk of unwitting inconsistency between those decisions is increased.

A second example arises from participation in investment arbitrations of entities that have an interest in the dispute but are not party to it — an opportunity that is increasingly sought and increasingly granted.

In *Micula* v *Romania*,[28] the arbitral tribunal granted leave to the European Commission to file submissions as a non-disputing party, but the Commission did not have access to the parties' submissions and the tribunal ordered that Romania could have no contact with the Commission concerning the arbitration. The tribunal also granted leave for three representatives of the Commission to appear at the hearing, not to make oral submissions, but instead to be cross-examined by the claimants' counsel, including on matters of law. This was in circumstances where the cross-examiner knew what all of the issues before the tribunal were, but the Commission's representatives subjected to the cross-examination could not.

There are two points to draw from these examples:

(a) constructively debating and coherently developing the law would be much better served by investment awards being public; and

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sons-for-dismissing-challenges-to-two-crimea-related-investment-treaty-awards-against-russia/> accessed 14 June 2020.

[28] *Ioan Micula et al* v *Romania* (I) (ICSID Case No ARB/05/20).

(b) there are serious questions about how usefully third parties can contribute to an arbitration without access to the parties' submissions.[29]

The first of those points is equally applicable to international commercial arbitration, with respect both to law and procedure. I therefore now turn to examples from international commercial arbitration which show that continued movement towards transparency is also desirable in that sphere.

The controversy surrounding the extent to which, for the purposes of international arbitration, barristers who are members of the same chambers should be regarded as independent from each other, is well known. That debate has existed for some time in the context of ICSID arbitration,[30] but has since spread to international commercial arbitration.

The ICC does not publish its decisions on challenges to arbitrators, so it is only by way of anonymised anecdote that I can recount the ICC's decision in one particular case.

Party A had appointed a London barrister as an arbitrator. He was a member of the same chambers as counsel for Party B, and no point was taken about that by anyone. However, when Party B then also nominated as an arbitrator a barrister from the same set of chambers, Party A, which was a continental European company, felt like there was a club forming of which neither it nor its own counsel, who were not based in London, were members. Party A thus challenged Party B's nomination, at the same time offering to withdraw its own, and the ICC declined to confirm both arbitrators, leaving each party to nominate a new one.

Leaving aside whether that decision of the ICC might be right or wrong:

(a) How can the question be properly debated if reasons are not given and published?

(b) Without published reasons, how can clients be properly advised as to what the ICC might be expected to do in similar circumstances, and what impact that should or should not have on a party's choice of arbitrator?

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[29] On this point, Working Paper #4 proposes that non-disputing parties be given access to the relevant documents by default, but not if either party objects. *See* ICSID, 'Proposals for Amendment of the ICSID Rules' (2020) Working Paper #4 vol 1, Arbitration Rules, r 67(6), pp 67-68, 336-337.

[30] *Hrvatska Elektroprivreda dd* v *Republic of Slovenia* (ICSID Case No ARB/05/24) Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008.

Conscious of the problem, but not providing a satisfactory solution to it, the ICC retained the following statement in its 1 January 2019 version of its 'Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration', with some modifications from earlier versions:

> Communication of Reasons for Court Decisions
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> 14. Upon request of any party, the Court may communicate the reasons for (i) a decision made on the challenge of an arbitrator pursuant to Article 14; (ii) a decision to initiate replacement proceedings and subsequently to replace an arbitrator pursuant to Article 15(2); and (iii) decisions pursuant to Articles 6(4) and 10.
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> 15. For arbitrations conducted under the Rules in effect prior to the entry into force of the 2017 Rules, a request for communication of reasons must be made jointly by all parties.
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> 16. Any request for the communication of reasons must be made in advance of the decision in respect of which reasons are sought. For decisions pursuant to Article 15(2), a party shall address its request to the Court when invited to comment pursuant to Article 15(3).
>
> 17. The Court has full discretion to accept or reject a request for communication of reasons.[31]

The problems with this remain significant, and before one even reaches the question of publicly available reasons, there is the more fundamental question of the provision of reasons to the parties and the arbitrators. If under the 2017 Rules either party requests reasons, then the ICC Court 'may' decide to provide them, retaining 'full discretion' as to whether or not it does so. There is not an obviously legitimate justification for that discretion. Where earlier versions of the Rules are applicable, a request for reasons will only be valid if it is made by all parties. Requests for reasons must be made in advance of the decision being made, implicitly acknowledging that where reasons are necessary it may lead to a different process and/or outcome. On a matter as important as whether an arbitrator may sit in a case in which she has been chosen, reasons should always be given. It would also be preferable if unless the parties have agreed otherwise, decisions on challenges to arbitrators be made public, with appropriate redactions if necessary, so that what is currently an area of decision-making filled with uncertainty, could be placed on firmer and more predictable foundations.

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[31] ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules' (2019), paras 14-17.

The LCIA and the SCC have made progress in this regard. The 1998 LCIA Arbitration Rules did not require the LCIA Court to provide reasons for its decisions on challenges to arbitrators.[32] Nonetheless, the Court's practice under those Rules came to be to communicate reasoned decisions to the parties.[33] This became an express requirement under the 2014 LCIA Arbitration Rules.[34] In addition to providing reasons to the parties and arbitrators concerned, the LCIA has twice published digests of its decisions on arbitrator challenges, and has established a publicly accessible database which it has undertaken to update periodically.[35]

The SCC Arbitration Rules do not, even in their most recent version, require that the SCC Board provide reasoned decisions on arbitrator challenges. However, in September 2017 the SCC adopted a new policy pursuant to which brief reasons of a paragraph or two are provided to the parties, with the possibility of more extensive reasons being provided 'if warranted by the circumstances of a particular challenge.'[36] Equally, the SCC has also now twice published practice notes containing summaries of decisions on challenges to arbitrators.[37] There has thus been some movement by some arbitral institutions in an encouraging direction, but it is neither uniform nor sufficient.

A second example from international commercial arbitration is directed to the proposition that there are a number of high-quality arbitral awards dealing with matters of general interest that very few people have the benefit of reading.

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[32] LCIA Arbitration Rules 1998, art 29.1: 'The decisions of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. Such decisions are to be treated as administrative in nature and the LCIA Court shall not be required to give any reasons.'

[33] *See* Thomas W Walsh and Ruth Teitelbaum, 'The LCIA Court Decisions on Challenges to Arbitrators: An Introduction' (2011) 27(3) Arbitration International p 283, p 286.

[34] LCIA Arbitration Rules 2014, art 10.6: 'Unless the parties so agree or the challenged arbitrator resigns in writing within 14 days of receipt of the written statement, the LCIA Court shall decide the challenge and, if upheld, shall revoke that arbitrator's appointment. The LCIA Court's decision shall be made in writing, with reasons; and a copy shall be transmitted by the Registrar to the parties, the challenged arbitrator and other members of the Arbitral Tribunal (if any). A challenged arbitrator who resigns in writing prior to the LCIA Court's decision shall not be considered as having admitted any part of the written statement.'

[35] LCIA, 'LCIA Releases Challenge Decisions Online' (12 February 2018) <https://www.lcia.org//News/lcia-releases-challenge-decisions-online.aspx> accessed 14 June 2020; LCIA, 'Challenge Digests' (2011) 27(3) Arbitration International p 315.

[36] SCC, 'SCC Policy – Reasoned Decisions on Arbitrator Challenges' (8 September 2017) <https://sccinstitute.com/media/293809/scc-internal-policy-re-reasoned-decisions-final.pdf> accessed 14 June 2020.

[37] SCC, 'SCC Practice Note – SCC Board Decisions on Challenges to Arbitrators 2013-2015' (2016), pp 5-9; SCC, 'SCC Practice Note – SCC Board Decisions on Challenges to Arbitrators 2016-2018' (2019), pp 9-24.

In recent years, an arbitral tribunal chaired by Lord Collins, of which Gary Born and Toby Landau QC were the other members, rendered a 350-page award that addresses numerous issues of English tort and contract law. It makes findings dismissing allegations that had been publicly made of corruption involving officials of a State and of State-owned entities, and includes a detailed discussion of res judicata in the context of international arbitration, all of which is confidential.

Sir Bernard Rix has said that the dearth of published arbitral decisions means that commercial law is going 'underground' as parties choose to submit to arbitral tribunals rather than to courts what he called 'the basic feedstock of our commercial law'.[38] On this point, the ICC's January 2019 note referred to above is more promising. It says:

> Publication of Awards
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> 40. Publicising and disseminating information about arbitration has been one of ICC's commitments since its creation and an instrumental factor in facilitating the development of trade worldwide.
>
> 41. Parties and arbitrators in ICC arbitrations accept that ICC awards made as from 1 January 2019 may be published according to the following provisions.
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> 42. The Secretariat will inform the parties and arbitrators, at the time of notification of any final award made as from 1 January 2019, that such final award, as well as any other award and dissenting or concurring opinion made in the case, may be published in its entirety no less than two years after the date of said notification. The parties may agree to a longer or shorter time period for publication.
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> 43. At any time before publication, any party may object to publication or require that any award be in all or part anonymised or pseudonymised, in which case the award will not be published or will be anonymised or pseudonymised.
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> 44. In case of a confidentiality agreement covering certain aspects of the arbitration or of the award, publication will be subject to the parties' specific consent.
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> 45. The Secretariat may anonymise or pseudonymise personal data included in the award as necessary pursuant to the applicable data protection regulations.

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[38] Rt Hon Sir Bernard Rix, 'Confidentiality in International Arbitration: Virtue or Vice?' (Jones Day Professorship in Commercial Law Lecture, Singapore Management University, Singapore, 12 March 2015), p 19.

> 46. The Secretariat may always, in its discretion, exempt awards from publication.[39]

This creates a default position that awards of sufficient interest may be published, but gives either party the right to veto publication or require anonymisation. Although the ICC's note does not purport to, and could not, override any confidentiality agreement between the parties, it is less obvious why, if the parties have not agreed between themselves on confidentiality, the ICC should grant any party a unilateral right of veto on publication, rather than reserving for the ICC or conferring on the tribunal the power to decide on publication, anonymisation, and redactions in cases of disagreement between the parties.

IV. What Further Changes Should be Made in Relation to International Commercial Arbitration?

In a speech given in March 2017, the then Lord Chief Justice of England and Wales, Lord Thomas, referred to 'the need to make the Commercial Court the most attractive place to resolve disputes', including because, 'resolution of disputes involving legal issues before the court is the best way not only of determining the dispute but of developing the law'.[40]

My own view is that sophisticated commercial parties are sufficiently well equipped to determine for themselves the forum before which their dispute is best resolved. The more serious point concerns the potential impediment to the development of the common law that might flow from their choice. Reacting to that by more readily allowing appeals from arbitral tribunals to courts, as Lord Thomas suggested,[41] is not an alternative that would assist London to remain an important seat of international arbitrations.

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[39] ICC, (n 31), paras 40-46. The 2018 Hong Kong International Arbitration Centre Rules provide in Article 45.5 that:

> 'HKIAC may publish any award, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:
> (a) all references to the parties' names and other identifying information are deleted; and
> (b) no party objects to such publication within the time limit fixed for that purpose by HKIAC. In the case of an objection, the award shall not be published.'

[40] Rt Hon the Lord Thomas of Cwmgiedd, 'Keeping Commercial Law Up to Date' (Jill Poole Memorial Lecture, Aston University, Birmingham, 8 March 2017), para 41.

[41] Rt Hon the Lord Thomas of Cwmgiedd, 'Commercial Dispute Resolution: Courts and Arbitration' (The National Judges College, Beijing, 6 April 2017), paras 22-23, 29-31; Rt Hon the Lord Thomas of Cwmgiedd, (n 40), paras 41-46; Rt Hon the Lord Thomas of Cwmgiedd, 'Launch of TheCityUK's Legal Services Report 2016' (London, 20 July 2016), para 16; Rt Hon the Lord Thomas of Cwmgiedd, 'Developing commercial law through

A much better solution would be to publish more arbitral awards. Lord Neuberger has remarked that the 'ossification' of the common law can be avoided, 'if excellent awards by excellent arbitrators are published'.[42] After quoting this statement by Lord Neuberger, Dame Elizabeth Gloster added that:

> This would allow the courts to benefit from the work being done in arbitrations, which in turn would support the demand for reporting of awards. I would therefore add my voice to those saying that it would be highly desirable if awards could be published on a more systematic and accessible basis. Not only would this be likely to ameliorate the problem of the market, legal practitioners, the courts and arbitrators being unaware of previous arbitral decisions on the same point, but it would also contribute to the development of English commercial law and help to foster (even) better decision-making by tribunals.[43]

Sir Bernard Rix has proposed a default rule of the publication of anonymised awards.[44] Chief Justice Allsop of the Federal Court of Australia has also suggested that:

> the publication of redacted reasons of arbitral awards of importance on legal questions would go a long way to solving Lord Thomas' expressed concern without impinging necessarily upon the rights of privacy and confidentiality of the parties to their dispute. It may also burnish the reputation of the arbitral process, of the arbitrator and of the institution connected with the arbitration.[45]

I confess that I have some doubts about the utility of awards that are stripped not only of the names of the parties, but of all information that could identify them. Often that will be quite a lot, and one is slow to rely on awards where the full factual circumstances cannot be appreciated, since they can be important to a full understanding of what was decided and why.

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the courts: rebalancing the relationship between the courts and arbitration' (The Bailii Lecture, Freshfields Bruckhaus Deringer, London, 9 March 2016), paras 32-34.

42 Rt Hon the Lord Neuberger of Abbotsbury, 'Arbitration and the Rule of Law' (Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015), para 24.

43 Rt Hon Dame Elizabeth Gloster, DBE, PC, 'Symbiosis or Sadomasochism? The relationship between the courts and arbitration' (2018) 34(3) Arbitration International p 321, pp 338-339.

44 Rt Hon Sir Bernard Rix (n 38), p 21.

45 The Hon James Allsop AO, 'Commercial and Investor-State Arbitration: The Importance of Recognising Their Differences' (ICCA Congress 2018 Opening Keynote Address, Sydney, 16 April 2018), para 31.

I would go further and suggest as a default position that any arbitral award should not be confidential, unless the tribunal, after hearing the parties, decides that it or some part of it should be. Of course, if the parties have agreed on confidentiality, whether directly or through agreement on the application of a set of arbitration rules providing for confidentiality,[46] then no such default position would apply. Their agreement would apply, subject to any relevant applicable law. If parties want their arbitration to be confidential, they should so agree. Having confidentiality as the default position when parties have not addressed the question, seems to me to be undesirable.

The English Arbitration Act, 1996 is deliberately silent on the issue of confidentiality.[47] Confidentiality is the default position in arbitrations seated in England because the English judiciary implied an obligation of confidentiality into agreements to arbitrate, on the basis of the 'essentially private nature of an arbitration'.[48] Lord Justice Collins described the obligation under the common law of England and Wales on parties to arbitrations 'not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration' as, 'in reality a substantive rule of arbitration law reached through the device of an implied term'.[49] In India, although The Arbitration and Conciliation Act, 1996 was also silent on the issue of confidentiality in respect of arbitrations, in August 2019 it was amended to provide that those involved in an arbitration have a duty to maintain the confidentiality of the proceedings, except where disclosure of the award is necessary for the purpose of its implementation or enforcement.[50]

That obligations of confidentiality do and should flow from the private character of commercial arbitration is unquestioningly accepted by some, but it is not universally accepted, notably under the laws of France, Sweden, and the United States of America.[51] Nor is the position necessarily static.

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[46] *See* n 22 above for some of the various rules.

[47] *See* Rt Hon the Lord Saville of Newdigate, 'Reflections on the English Arbitration Act 1996 after fifteen years' (Chartered Institute of Arbitrators, Singapore, August 2012), p 7.

[48] *Dolling-Baker* v *Merrett* [1990] 1 WLR 1205, p 1213. *See* the discussion of *Dolling-Baker* v *Merrett* in Rt Hon Sir Bernard Rix (n 38), p 2.

[49] *John Forster Emmott* v *Michael Wilson & Partners Limited* [2008] EWCA Civ 184, paras 105-106 and *see* also para 84.

[50] The Arbitration and Conciliation Act, 1996 (as amended by the The Arbitration and Conciliation (Amendment) Act, 33 of 2019), s 42 A.

[51] *See* Gary B Born, International Commercial Arbitration (2nd edn, 2014) ch 20. *See* also, for eg, Philipp Ritz, 'Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law' (2010) 27(3) Journal of International Arbitration p 221, especially pp 229 and 231.

Australia's highest court famously held in 1995 in *Esso* v *Plowman* that arbitrations were inherently private,[52] but that it was not justifiable to conclude 'that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.'[53] The Australian High Court refused to imply any term into an agreement to arbitrate that each party would not disclose such information,[54] having noted that: 'If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement.'[55] Confidentiality was held to arise 'only in relation to documents which are produced by a party compulsorily pursuant to a direction by the arbitrator.'[56] In 2010, fifteen years after the judgment, the Australian legislature introduced more general obligations of confidentiality, but on the basis that they would apply only if the parties to the arbitration agreement agreed that they would.[57] In 2015, twenty years after *Esso* v *Plowman*, the legislation was changed again, to remove the provision that the statutory obligations of confidentiality would apply only if they were agreed to by the parties, and instead to list the confidentiality provisions as ones that apply by force of statute unless the parties to the arbitration agreement agree that they will not apply.[58] Thus, in Australia, the highest court found that there was not any general obligation of confidentiality, only to have the legislature eventually create one, whereas in England, by contrast, the legislature was deliberately silent on confidentiality, but the courts have nonetheless implied it.

Commercial law in England and Wales might not have gone 'underground' if the courts did not dig the burrow in which it may now have begun to live. It is no longer a very weatherproof burrow, since there are now many exceptions to this implied obligation, also worked out by the courts over time.[59]

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[52] *Esso Australia Resources Ltd* v *Plowman* [1995] HCA 19, Mason CJ (with whom Dawson and Toohey JJ agreed), para 27.

[53] *Esso Australia Resources Ltd* v *Plowman* [1995] HCA 19, Mason CJ, para 35, *see* also Brennan J, para 1.

[54] *Esso Australia Resources Ltd* v *Plowman* [1995] HCA 19, Mason CJ, paras 36-37.

[55] *Esso Australia Resources Ltd* v *Plowman*[1995] HCA 19, Mason CJ, para 33, *see* also Brennan J, para 2.

[56] *Esso Australia Resources Ltd* v *Plowman* [1995] HCA 19, Mason CJ, para 43, *see* also Brennan J, paras 3, 6-7.

[57] International Arbitration Amendment Act, 2010, item 16 B – s 22(3), item 18 – s 23 C-G, *see* also Revised Explanatory Memorandum accompanying the International Arbitration Amendment Bill, 2010, paras 149-161.

[58] Civil Law and Justice (Omnibus Amendments) Act, 2015, items 61-62.

[59] *See John Forster Emmott* v *Michael Wilson & Partners Limited* [2008] EWCA Civ 184, paras 60-114 and Rt Hon Sir Bernard Rix (n 38), p 8 discussing the exceptions recognised

My own view is that it would be a commendable step if the English common law were, for cases in which the parties have not agreed on confidentiality, to 'un-develop' the implied obligation of confidentiality that it developed.

V. CONCLUSION

Secrecy is a habit, not a need. Most who defend it do not have a better rationale than their perception that it is what parties to arbitrations want. The accuracy of that perception is questionable as a general proposition. It would be more accurate to say that some parties want some degree of confidentiality in some cases. But even if it were an accurate perception, it would be insufficient.

For better or for worse, international commercial arbitration is now a major forum for the resolution of disputes that have an impact on those other than the parties to them. It is a forum in which claims of corruption of public officials and of breaches of competition law are made and decided, in which States and State-owned entities are routinely parties with corresponding impacts on public funds, including in cases concerning the stabilisation of taxation obligations, and in which large swathes of commercial law, including concerning standard form commercial contracts, are applied and developed. There are, therefore, compelling reasons for people to be increasingly concerned about the fact that it is to a substantial degree happening in secret.

The public interest in transparency of dispute resolution has recently been acknowledged in the different context of sports arbitrations that have a compulsory character — compulsory because agreeing to arbitration is a condition for membership in a sports federation that controls access to participation in professional sporting events through which professional athletes earn their livelihood. In October 2018, the European Court of Human Rights found a breach of the European Convention on Human Rights because the Court of Arbitration for Sport denied an athlete's request for her hearing to be public.[60] The European Court of Human Rights stated that:

> The Court is of the view that the questions arising in the impugned proceedings — as to whether it was justified for the second applicant to have been penalised for doping, and for the resolution of which the CAS heard testimony from numerous experts — rendered it necessary

in *Ali Shipping Corp* v *Shipyard Trogir* [1999] 1 WLR 314; [1998] 2 All ER 136.

[60] *Mutu and Pechstein* v *Switzerland* [Third Section], nos 40575/10, 67474/10, ECHR 2018, paras 178-183, 92-115 and 23.

> to hold a hearing under public scrutiny. The Court notes that the facts were disputed and the sanction imposed on the applicant carried a degree of stigma and was likely to adversely affect her professional honour and reputation.[61]

Against that background, in the recent case brought by the World Anti-Doping Agency against the swimmer Sun Yang and the Fédération Internationale de Natation, at the request of the swimmer the Court of Arbitration for Sport held a public hearing, for only the second time in its history.[62] Although for mandatory arbitrations seated within the Council of Europe, the fair trial requirements provided for in the European Convention on Human Rights apply, different considerations apply to arbitrations between commercial parties that have freely agreed to arbitration.[63] Subject to applicable law, such parties can always agree to confidentiality. If, however, they have not done so, it is in a number of cases, and categories of cases, questionable that the law should impose confidentiality. Simply proceeding on the assumption that when parties choose arbitration they are impliedly choosing confidentiality, may no longer be a sufficient justification for keeping secret that which others may have a legitimate interest in knowing.

The storm of controversy that came to investment arbitration may be on its way to international commercial arbitration, or at least to certain kinds of international commercial arbitration. In circumstances in which the parties have not agreed that their arbitration is confidential, justifying secrecy based on the supposed expectations of those who use it will be too narrow a foothold successfully to defend it. There are other interests that matter.

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[61] *Mutu and Pechstein* v *Switzerland* [Third Section], nos 40575/10, 67474/10, ECHR 2018, para 182.

[62] Court of Arbitration for Sport, Media Release, 'CAS Public Hearing – *WADA* v. *Sun Yang & FINA*. Background Information' (12 November 2019) <https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6148_12.11.19.pdf> accessed 14 June 2020; Court of Arbitration for Sport, Media Release, 'CAS Public Hearing – *WADA* v. *Sun Yang and FINA*. Registration for the Public Viewing Area' (4 November 2019) <https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6148_public.pdf> accessed 14 June 2020; Court of Arbitration for Sport, Media Release, 'Swimming, The hearing in the CAS arbitration procedure between WADA, Sun Yang and FINA to be held in public' (20 August 2019) <https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6148_Public_Hearing.pdf> accessed 14 June 2020.

[63] *See Mutu and Pechstein* v *Switzerland* [Third Section], nos 40575/10, 67474/10, ECHR 2018, paras 92-115.